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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 93

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
TEXACO, INC..

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-12a) is reported at 371 F. 2d 1. The opinion and order of the Federal Power Commission (J.A. 271-281)[1] are reported at 33 F.P.C. 237 and its opin-

[1] "J.A." references are to the joint appendix in the court below.

ion and order denying rehearing (J.A. 299-304) at 33 F.P.C. 818.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1967 (Pet. App. A, pp. 11a-12a). The petition for a writ of certiorari was filed on April 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

The Federal Power Commission issued a certificate of public convenience and necessity authorizing a pipeline ("Transco") to transport natural gas for an independent producer ("Texaco") which was to deliver its gas to the pipeline in Louisiana and Texas and to accept the redelivery of equivalent quantities of gas from the pipeline near Texaco's refinery in New Jersey. The transported gas was to be commingled in the pipeline with gas purchased by Transco for resale in interstate commerce. The principal questions presented are:[2]

1. Whether the transportation agreement must be viewed as involving a sale of the gas to the pipeline followed by a sale by the pipeline at the terminal, solely because the gas was to be commingled with gas purchased by the pipeline for resale.

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[2] Petitioner also raises questions concerning the substantiality of the evidence to support various findings made by the Commission (see p. 10, n. 5, *infra*).

2. Whether the Commission erred in concluding that the transportation of the gas in interstate commerce ended when the gas was delivered to the producer near its refinery.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001-1011, and the Commission's Rules of Practice and Procedure, 18 C.F.R. 1 *et seq.*, appear in the Appendix, *infra*, pp. 12-15.

STATEMENT

Transcontinental Gas Pipe Line Corporation ("Transco"), the owner and operator of an interstate pipeline system, applied to the Federal Power Commission, pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), for a certificate of public convenience and necessity authorizing (1) the transportation of natural gas for Texaco Inc., from gas reserves which the latter owns in Texas and Louisiana, for consumption in the operation of Texaco's refinery at Westville in Gloucester County, New Jersey (J.A. 132), and (2) the construction of the facilities necessary for this transportation.

The arrangement (J.A. 132-137), designed to permit conversion of Texaco's refinery operations from fuel oil to natural gas in order to effect savings in its operating costs and to free fuel oil for other purposes, specifies the delivery of gas by Texaco to

Transco at mutually agreeable points in the producing areas of Texas and Louisiana where Texaco has available natural gas supplies, and the redelivery of an equivalent volume of gas of comparable quality by Transco to Texaco at a mutually agreeable point on Transco's existing Marcus Hook-Woodbury pipeline, which is approximately 4½ miles from the refinery (J.A. 136-138), the gas then to be delivered to the refinery through a newly constructed 100-foot line and an existing line that had previously been used to store refined products (J.A. 65, 169). The contract fixes a prices of 22¢ per Mcf for the service rendered by Transco. Texaco did not seek the Commission's authorization to construct or to operate the required new facilities for taking the gas from Transco's pipeline to Texaco's plant. Petitioner, a customer of Transco, intervened in the Commission proceeding to oppose the application.

The hearing examiner granted Transco the requested transportation authorization; he also held that Texaco did not require Commission authorization to construct and operate the new facilities. On review, the Commission, in its order granting a motion for oral argument, raised *sua sponte* the question whether the arrangement between Texaco and Transco involved a sale of gas by Texaco to Transco for resale by Transco and therefore required the producer to secure Commission authorization for the sale (J.A. 250-252). It subsequently concluded that the transaction might properly be regarded as one involving transportation. The Commission distinguished *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366—where this Court had

upheld the Commission's jurisdiction over producers' sales although the contracts specified that all of their gas (which was commingled with gas intended for resale in interstate commerce) would either be consumed in the producing State or used by the pipeline itself—as having involved a situation where there was a danger that substantial volumes of gas moving in interstate commerce might escape federal regulatory authority altogether. This danger was not present here, the Commission reasoned, since the terms of the transportation were subject to the agency's plenary certificate and rate authority (J.A. 279-280).

In denying a petition for rehearing the Commission also rejected the contention that Texaco was required to obtain a transportation certificate for its relatively short lead-in line. It found that this line had been, and would continue to be, used only for refinery purposes, since gas which enters into it cannot be resold, and that the line, as part of the plant facility, did not require certification.

The court of appeals affirmed, agreeing with the agency's legal conclusions and holding that its findings of fact were supported by substantial evidence.

ARGUMENT

1. Transco, an interstate pipeline company, agreed with Texaco to transport natural gas produced by Texaco from the latter's Texas and Louisiana fields to its New Jersey refinery, where the gas would be consumed. As required by Section 7(c) of the Natural Gas Act, the agreement was submitted to the Commission for its approval; and, after a hearing,

the Commission approved it upon finding that all of its terms were consistent with the public convenience and necessity. Petitioner contends, however, that the Commission was also required to assert jurisdiction over the transaction as a "sale" in order to prevent the emergence of a regulatory gap.[3] In our view, there is no such gap; the Commission's authority over the transaction *qua* transportation is fully adequate to protect the public interest. This is not a case where the gas consumer might be affected by the Commission's failure to treat a transaction as a sale within its jurisdiction, for Texaco consumes in its own plant all of the gas that Transco delivers to it in New Jersey. Nor can it be contended that the pipeline failed to make an adequate charge for the transportation service and thereby shifted to the pipeline's other customers (of which petitioner is one) a disproportionate share of the cost of transporting gas through its lines. The Commission carefully scrutinized the terms of the transportation agreement, as the statute requires, to determine their consistency with the public convenience and necessity. It affirmed (see J.A. 280-281) the examiner's express finding (see J.A. 201-213) that the price fixed by the agreement was not discriminatory or otherwise improper; petitioner does not challenge this finding. And, we stress, that price remains subject to the Commission's continuing rate jurisdiction (*infra*, p. 7).

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[3] The court below noted that the transaction was not rendered a sale by the pipeline's assumption of risk for the gas in transit. Such a provision is not unusual in contracts of carriage at common law.

Thus, in the context of this case, the Commission's approach provides as much protection for consumer interests as if it were required to determine whether, viewed as a sale, the transaction was consistent with the public convenience and necessity. The Commission could have disapproved the agreement here if it had found that its price or other terms were not in the public interest (it found the contrary). It can still direct modification of the terms in the future, should changed circumstances warrant. See *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348. And it can at any time initiate a proceeding to determine whether the rate provided for in the agreement remains a just and reasonable one. See Section 5(a) of the Act. Nor may the parties change the terms of the agreement without the Commission's approval.

The case is thus quite different from *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366. There, producers sold gas to a pipeline company which commingled their gas with other gas, selling a portion of the resulting volumes locally (or using them itself) and selling the remaining portion in interstate commerce for resale. This Court upheld the Commission's view that the producers' sales were subject to regulation by the Federal Power Commission, notwithstanding a stipulation in their contract with the pipeline that all of their gas would be either sold locally or used by the pipeline itself. By the fiction that a portion of the commingled gas in the pipeline could be traced to the particular producers' sales, the pro-

ducers and pipeline sought to avoid any continuing rate regulation by the Commission, whose jurisdiction over sales is limited to those in interstate commerce for resale. This Court refused to countenance such a loophole in the protections of the Natural Gas Act.

No comparable regulatory gap is presented by the Commission's ruling here that a company engaged in purchasing and reselling natural gas may also transport gas as a service for another without necessarily being deemed the purchaser of the gas thus transported. The transportation agreement gives the Commission a regulatory "handle" on the transaction that it lacked in *Lo-Vaca*. There, unless the transaction was deemed a sale, the Commission had no continuing authority over its terms. Here, in viewing the transaction as the transportation arrangement it purports to be, the Commission is still obliged to satisfy itself that the relevant terms—including the price of the transportation—are consistent with the public convenience and necessity. This, we stress, is the identical standard that the Commission applies when deciding whether to authorize the construction or use of transportation facilities needed to make a direct sale. And, as we have noted, the price for the transportation is subject to the Commission's continuing rate regulation to the same extent as would be the price for a sale of the gas to the pipeline.

There is an additional distinction between this case and *Lo-Vaca*. There, producers were selling gas at a price above the going price in the gas field, and the question was whether the Commission lacked juris-

diction over such sales. Here, there is no danger resulting from a failure to regulate major sales that could significantly affect the price of gas sold in the field. The arrangement between Texaco and Transco relates only to the transportation of gas that is to be consumed by the producer in its own operations.[4]

2. There is no merit to the contention (Pet. 16-19) that Texaco should have been required to obtain a certificate of public convenience and necessity for the operation of the 4½-mile span of pipeline between the point of redelivery and Texaco's refinery. The Commission's conclusion that Texaco's delivery line was in fact part of the refinery and that interstate commerce therefore ceased when Texaco accepted redelivery presents no issue of practical or general importance. As the court below explained (Pet. App. A, p. 8a), there is no inconsistency with this Court's decision in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464. In that case, the Commission was held to have jurisdiction over a natural gas company owning and operating more than 100 miles of high-pressure lines within the State of Ohio and selling gas

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[4] The absence of any sale here distinguishes *Florida Gas Transmission Co.*, F.P.C. Docket No. CP 65-393, Opinion No. 516, decided by a divided Commission after its order in the present case. In that case, there was a sale by a producer in Louisiana to a power company in Florida and the gas involved in the sale was transported from producer to power company by an interstate pipeline. The only issue in *Florida Gas* was whether the sale by the producer to the power company was a nonjurisdictional direct sale to the power company, or a jurisdictional sale to the pipeline for resale to the power company; no such issue is presented in this case.

to more than one-half million consumers in Ohio from the company's own local distribution systems. Here, by constrast, Texaco's short line was to be used solely for its own immediate refinery purposes. Cf. *The Pipe Line Cases*, 234 U.S. 548, 562.[5]

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[5] The additional grounds of review advanced by petitioner are insubstantial. The claim that the examiner improperly relied upon facts he officially noticed from a later filing by Transco is belied by Section 7 of the Administrative Procedure Act and Section 1.26(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. 1.26(d), which permit official notice of facts so long as any party, on request, is given an opportunity to rebut them. Petitioner neither objected to the taking of official notice here nor sought an opportunity to rebut the noticed facts. The contention that the Commission should have required a present reduction in Transco's resale rates to compensate its present customers for the loss of "cheap expendability" has no application to the facts in this case, since it is based on the erroneous assumption that the pipeline's idle capacity would be committed to a non-jurisdictional activity and thus removed from continuing Commission jurisdiction over the transportation rates here involved. Finally, there is no substance to the argument that the Commission's denial of a certificate in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, also required a denial of the very different proposal here. Not only must each certificate case be decided on its own facts, but the factors considered decisive in the earlier case were not present here. No unregulated field sales are involved and no claim has been made that Texaco's use is an inferior use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1967.

APPENDIX

The Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w, provides in pertinent part as follows:

> SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.
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> * * * *
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> SEC. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or ex-

tension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *.

The Administrative Procedure Act, June 11, 1946, c. 324, 60 Stat. 237, 5 U.S.C. (1964 ed.) 1001-1011, provides in pertinent part as follows:

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the pub-

lished rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

> (d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

Section 1.26(d) of the Federal Power Commission Rules of Practice and Procedure, 18 C.F.R. 1.26(d), provides:

> (d) *Official notice of facts.* Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter of technical or scientific fact of established character peculiarly within the general knowledge of the Commission as an expert body; *Provided*, That any party shall, on timely request, be afforded an opportunity to show the contrary.

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